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Supreme Court, U.S.
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No. 07-322

In The

Supreme Court of the United States

ANN WEGELIN,

Petitioner,

v.

JEAN SCHMEHL and DAVID SCHMEHL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 23 Pa.C.S.A. Section 5312 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

LIST OF ALL PARTIES TO THE PROCEEDINGS WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The Respondents in this Writ of Certiorari to the Supreme Court of Pennsylvania are Jean Schmehl and David Schmehl. Perry Schmehl (father) did not participate in this matter before the Supreme Court of Pennsylvania.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

None.

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OPINIONS BELOW

The Judgment and Opinion of the Supreme Court of Pennsylvania appears in Appendix A hereto. Said opinion reversed and remanded for further proceedings the Order and Opinion of the Court of Common Pleas, Berks County, Pennsylvania, dismissing Respondents' Complaint for Child Custody pursuant to the Pennsylvania Grandparents Visitation and Custody Act, The Opinion of the Court of Common Pleas appears in Appendix B hereto.

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari arises from a custody action filed by Respondents Jean and David Schmehl. The Order of the Court of Common Pleas of Berks County, Pennsylvania was filed on July 14, 2005. On August 3, 2005, Respondents filed their Notice of Appeal to the Pennsylvania Supreme Court entered on August 30, 2005. The Pennsylvania Supreme Court entered an Order noting possible jurisdiction. On June 12, 2007, the Pennsylvania Supreme Court entered its Opinion.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code Section 1257.

Cases that sustain the jurisdiction of this Court include *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Clark v. Jeter,* 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988); and *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

STATUTE INVOLVED

23 Pa.C.S.A. Section 5312

STATEMENT OF THE CASE

The facts of the case underlying this Petition for Writ of Certiorari are as follows:

Ann Wegelin ("Petitioner") and Perry Schmehl ("Father") have two (2) minor children. Petitioner and Father were married on January 4, 1992 in Berks County, Pennsylvania. The parties were divorced by Decree in Berks County, Pennsylvania on April 11, 2003, The parties are operating pursuant to a Custody Order dated November 11, 2002 at No. 02-2891 in the Court of Common Pleas, Berks County, Pennsylvania.

Petitioner has primary physical custody of the minor children and Father has certain rights to partial custody. Paternal grandparents Jean and David Schmehl ("Respondents") are divorced and have been seeing their grandchildren during Father's periods of partial custody.

On April 29, 2005, Respondents filed a complaint for custody/visitation against Petitioner pursuant to the Grandparents' Visitation Act at 23 Pa.C.S.A. Section 5312.

On May 5, 2005, Petitioner filed preliminary objections to Respondents' claims for failure to include a necessary party, namely, Father. On May 11, 2005, Petitioner filed a praecipe for argument court, brief in support of her argument that 23 Pa.C.S.A. Section 5312 was unconstitutional and Notice to the Pennsylvania Attorney General pursuant to Pa.R.C.P. Rule 235.

On June 27, 2005, Respondents filed their Brief in Support of the Constitutionality of 23 Pa.C.S.A. Section 5312.

Oral argument was heard before the Honorable Scott D. Keller on July 11, 2005. On July 14, 2005, Judge Keller dismissed Respondents' complaint and held that 23 Pa.C.S.A. Section 5312 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

On July 29, 2005, Judge Keller filed the Opinion finding 23 Pa.C.S.A. Section 5312 violates the Fourteenth Amendment.

On August 3, 2005, Respondents filed their Notice of Appeal. On August 30, 2005, the Supreme Court entered an Order noting probable jurisdiction. On June 12, 2007, the Supreme Court of Pennsylvania in a 4-3 decision reversed the trial court and remanded the case for further proceedings.

All federal questions to be reviewed were raised by briefs, appropriate motions and argument in the Court of Common Pleas of Berks County and the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

I. PARENTS HAVE A FUNDAMENTAL RIGHT TO THE CARE AND CONTROL OF THEIR CHILDREN AND WITH WHOM THEY ASSOCIATE

The Fourteenth Amendment of the United States Constitution states "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S. Const. Amend. XIV.

In *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), Justice O'Connor writes:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law," "We have long recognized that the Amendment's Due Process Clause like its Fifth Amendment counterpart," "guarantees more than fair process." *Washington v. Glucksberg,* 521 U.S. 702, 719, 138 L.Ed.2d 772, 117 S. Ct. 2258 (1997). The clause also includes a substantive component that "provided heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 720, 138 L.Ed.2d 117 S. Ct. 2258; see also *Reno v. Flores,* 507 U.S. 292, 301-302, 123 L.Ed.2d 1, 113 S.Ct. 1439 (1993), The liberty interest at issue in this case – the interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyers v. Nebraska,* 262 U.S. 390, 399, 401, 67 L.Ed.2d 1042, 43 S.Ct. 625 (1923) we held that the "liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up children" and "to control the education of their own." *Id.* at 56.

From the aforementioned, it is clear in the Due Process Clause that a parents' constitutional right to custody and control of their children and to choose whether to expose their children to certain individuals or ideas is superior to that of any other person.

Where there is an intact family, grandparents cannot petition the courts for visitation and/or custody because of the fundamentally protected right. If intact parents decide they do not want their parents involved with their children, the State has no interest in stating the children are better off with the grandparents being involved. Additionally, grandparents, siblings, aunts and uncles and any other third party do not have a fundamental right to have a relationship with children.

II. NO COMPELLING STATE INTEREST EXISTS TO TREAT FIT SEPARATED PARENTS DIFFERENTLY FROM FIT PARENTS RESIDING TOGETHER REGARDING FUNDAMENTALLY PROTECTED RIGHTS

The Fourteenth Amendment of the United States Constitution guarantees "No State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws."

Pursuant to the Equal Protection Clause, one must "first determine what burden of jurisdiction the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 253, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974).

When a fundamental right is at issue, the "strict scrutiny" formula for reviewing the constitutionality of the

State's burden upon that right must be addressed. *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

When a compelling State interest is at stake, the classification must be narrowly tailored to serve the State interest. *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

There can be no doubt that the State has a compelling interest in protecting the well-being of children regardless if the parents are living together or not. The fundamental right of parents to the care and control of their children is not limitless.

The State has the right to intervene on behalf of the children in anything that will jeopardize their health or safety.

States have enacted the following laws to protect children:

a. Child Labor Laws;

b. Court Ordered Transfusion;

c. Compulsory Vaccinations;

d. Compulsory Education;

e. Seatbelt Laws;

f. Alcohol to Minors;

g. Corruption of Minors;

h. Abortion Laws;

i. Mental Issues;

j. Harm Arising from Activities on the Street;

k. Abuse or Neglect;

l. Stabilization of Home Environments;

m. Juvenile Acts; and

n. Sexual Materials and Sexual Contents.

The State's legitimate and compelling interest in protecting children also has its limits. When a fit parent makes a decision concerning their child's life and said decision does not jeopardize the health or safety of said child, the State cannot interfere with that constitutionally protected right.

"The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a better decision could be made." *Troxel,* 120 S.Ct. 2054

23 Pa.C.S.A. Section 5312, when parents' marriage is dissolved or parents are separated states as follows:

> In all proceedings for dissolution, subsequent to the commencement of the proceedings and continuing thereafter or when parents have been separated for six (6) months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.

23 Pa.C.S.A. Section 5312 discriminates in the right to engage in a constitutional activity by parents who are unmarried and not residing together, separated, and/or

divorced. This classification significantly burdens the right to exercise a constitutionally protected activity.

By classifying parents who are married and reside with their spouse and/or are unmarried and live together differently than unmarried and not residing together, separated and/or divorced parents, the latter lose their fundamental right to the care, custody, control and with whom their children can associate.

In a "suspect classification analysis" the burden is upon the State to prove the classification must be necessary to a compelling government interest.

If the State has a compelling interest in protecting children from harm, the Commonwealth of Pennsylvania must believe that a child deprived from seeing his/her grandparent is a substantial harm to the child over the objection of a fit parent. Nowhere in the constitution does it state that grandparents are a necessity to a child. If this were true, parents residing together would also be targeted in grandparent visitation statutes. Clearly, depriving a child from his/her grandparents is not the same as depriving a child of shelter, food, care and meeting their basic needs. Therefore, without a showing of a substantial harm to a child as a result of the denial of grandparent visitation, the State intrusion is unwarranted.

23 Pa.C.S.A. Section 5312 attacks the parenting capabilities of any parent who does not live in a home which includes both mother and father, and their children. The statute grants grandparents automatic standing to pursue custody rights and permits the trial court to determine the best interest of the child over the objections of a fit parent.

If any parents who were separated, divorced, or for any reason were not living together and then decided to cohabitate, the grandparents would not have standing to proceed under Section 5312. Therefore, the only ingredient necessary to invoke Section 5312 is that the parents do not reside together.

The second prong of the "strict scrutiny test" is that the classification must be narrowly tailored to serve the compelling statute interest. *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

If the State is trying to prevent a substantial harm to children due to the denial of the visitation with their grandparents, the State must identify those children who will suffer a greater harm from the denial of grandparent visitation. There may be a list of qualities that could be created in a narrowly tailored way to identify the aforementioned children at risk; however, Section 5312 merely addresses those parents who do not reside together. When parents do not reside together this does not address the issue of at risk children with any degree of accuracy to comport with a classification that must be narrowly tailored to serve the State's compelling interest.

The classifications set forth in Section 5312 are substantially overinclusive and underinclusive to the State's objectives. *City of Richmond v. Croson,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Johnson v. California,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); and *Zablocki, supra.*

The classifications are overinclusive because countless children covered by this statute are not at risk due to the denial of seeing their grandparents versus those children who are at risk because of said denial.

The classifications are also underinclusive because there are numerous family issues and factors not delineated in the statute which may cause an increased substantial risk to children due to the ability to have an ongoing relationship and visitation with their grandparents.

The justifications set forth by the Pennsylvania Supreme Court in holding 23 Pa.C.S.A. Section 5312 constitutional are inconsistent with the equal protection clause of the United States Constitution and United States Supreme Court decisions.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays this Honorable Court to grant the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania and submits that this Petition brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted by,

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Appendix B – Decision of the Honorable Scott D. Keller of the Court of Common Pleas of Berks County, Pennsylvania 30a

APPENDIX A

[J-142-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

JEAN SCHMEHL AND DAVID SCHMEHL, Appellants v. ANN WEGELIN AND PERRY SCHMEHL, Appellees.	: No. 87 MAP 2005 : Appeal from the Order of the Court of Common Pleas of Berks County, entered on July 14, 2005 at Dkt. No. 05-5526. : SUBMITTED Nov. 29, 2005

OPINION

MR. JUSTICE SAYLOR **DECIDED: June 12, 2007**

The question presented is whether Section 5312 of the Domestic Relations Code violates the Equal Protection Clause of the United States Constitution in providing for grandparent visitation of a child when the child's parents are divorced, engaged in divorce proceedings, or separated for six months or more.

On November 12, 2002, during Mother and Father's separation, a custody order was entered between them regarding their two children. Five months later they were divorced. On April 29, 2005, after Mother refused to permit the children's paternal grandparents ("Grandparents") to pick up the children from school during her period of custody, Grandparents filed an action in the Court of Common Pleas of Berks County under Section

5312 seeking partial custody.[1] Although Father supports his parents' claim, Grandparents joined him as a defendant as a necessary party. *See* Pa.R.C.P. No.1915.6. Mother moved to dismiss the action, asserting that Section 5312 violated her Due Process and Equal Protection rights under the Fourteenth Amendment of the United States Constitution.[2]

The challenged statute enables grandparents to seek partial custody or visitation of their grandchild when the child's parents are divorced, engaged in divorce proceedings, or have been separated for six months or more. *See* 23 Pa.C.S. § 5312. In particular, the statute provides:

> In all proceedings for dissolution, subsequent to the commencement of the proceeding and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.

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[1] Grandparents are divorced, but have cooperated to seek partial custody.

[2] The Equal Protection Clause, in pertinent part provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law; . . . " *Id.*

Id. In contrast, standing to obtain partial custody or visitation is not afforded to grandparents of children whose parents are married and living together.[3] This disparate treatment between intact families – married parents living together – and divorced or separated parents, Mother argued, violates equal protection principles.

The trial court agreed, finding that Section 5312 violates the Equal Protection Clause because it impermissibly treats intact families differently from parents who are divorced or separated, and dismissed Grandparent's complaint without addressing the merits of their claim. The trial court noted that the "prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications. . . ." *Schmehl v. Wegelin,* No. 05-5526, *slip op.* at 3 (C.P. Berks July 29, 2005) (quoting *Curtis v. Kline,* 542 Pa. 249, 256, 666 A.2d 265, 268 (1995)). But when that classification burdens a fundamental right, the court explained, strict scrutiny is applied, which requires the classification to be necessary for a compelling government interest. *See id.* Because the classification under Section 5312 burdened a parent's fundamental right to make decisions regarding the upbringing of his or her children, the trial court held that, to uphold the legislative classification created by the statute between parents who are married and living together versus those who are divorced or separated, such classification must be necessary to vindicate a compelling government interest. *See id.* at 6.

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[3] Under Section 5311, when a child's parents are deceased, the parent of the deceased parent may seek partial custody or visitation. *See* 23 Pa.C.S. § 5311.

The trial court found that no compelling government interest existed for the classification, noting that, although the parents are no longer together, it does not logically follow that state intervention is necessary. In particular, the court observed:

> Both parents remain and, during periods of their partial custody with the children, either parent can provide access to their parents. There is no compelling reason that this Court can see for the state to require that Mother give up more of her time with the children, so that Father's parents can have their own periods of visitation separate from visitations while Father has custody. . . . There is no compelling reason, in fact it would create the potential for greater harm, if a child of separated/divorced parents would be subject to, in this case, [two] more potential periods of Court ordered partial custody/visitation. A child of an intact family has freedom to live their life as a child, absent court ordered scheduling of their time. There is no reason to burden a child of separated/divorced parents with more court ordered interference in their already restricted childhood. Their parents can make sure there is contact with the grandparents.

Schmehl, No. 05-5526, *slip op.* at 8.

In its subsequent opinion under Rule of Appellate Procedure 1925(a), the trial court reiterated its earlier ruling, explaining:

> Although the parents no longer live together, each must continue to enjoy the fundamental right, free from court interference, to make decisions about the upbringing of their children, including the decision about with whom the

> children associate. It is important to note that this court's decision does not preclude [Grandparents] from ever seeing the children, which they may do during periods of the father's partial custody. It merely asserts that there is no compelling reason to justify subjecting the children of divorced or separated parents to additional periods of Court ordered . . . custody and visitation, nor requiring Mother to relinquish periods of her custody so that Father's parents may have their own periods, when such court intervention would not be permissible if the parents were married or living together.

Schmehl v. Wegelin, No. 05-5526, *slip op.* at 3 (C.P. Berks September 19, 2005). Grandparents appealed to this Court, which has exclusive appellate jurisdiction of decisions of a court of common pleas that determine a statute to be unconstitutional. *See* 42 Pa.C.S. § 722(7).

As the constitutionality of statute presents a question of law, our review is plenary. *See Theodore v. Delaware Valley School Dist.,* 575 Pa. 321, 333-334, 836 A.2d 76, 83 (2003) (citing *Purple Orchid v. Pennsylvania State Police,* 572 Pa. 171, 813 A.2d 801 (2002)). A statute duly enacted by the General Assembly is presumed valid and will not be declared unconstitutional unless it "clearly, palpably and plainly violates the Constitution." *Purple Orchid,* 572 Pa. at 171, 178, 813 A.2d at 805. The party seeking to overcome the presumption of validity bears a heavy burden of persuasion. *See Commonwealth, Dep't of Transp. v. McCafferty,* 563 Pa. 146, 155, 758 A.2d 1155, 1160 (2000).

Grandparents challenge the trial court's determination that Section 5312 violates non-intact families' equal protection rights. Although Grandparents concede that Mother's interest in the care, direction, and control of her

children is a fundamental right, Grandparents assert that the need to protect children of non-intact families is a compelling government interest, and the standards set forth in the statute are narrowly tailored to such interest. In particular, Grandparents note that, under the statute, the grant of partial custody or visitation is not automatic; rather, it depends on several factors that they must establish.

In contrast, Mother argues that a state should not interject its own beliefs regarding parenting decisions or thwart a parent's ability to raise her children as she sees fit. She maintains that no compelling interest exists to treat married parents differently from separated parents who are still alive and still fit to make decisions regarding their children. Although she and Father are divorced, Mother contends, it does not logically follow that state intervention is necessary.

In *Hiller v. Fausey,* 588 Pa. 342, 904 A.2d 875 (2006), *cert. denied,* ___ U.S. ___, ___ S.Ct. ___, 2007 WL 879630 (Mar. 26, 2007), this Court recently considered the constitutionality under the Due Process Clause of another grandparent visitation statute, Section 5311 of the Domestic Relations Code, which delimits the circumstances in which a grandparent may seek partial custody or visitation of his or her grandchild when a parent has died.[4]

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[4] Section 5311 provides:

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of

(Continued on following page)

Observing that the right to make decisions concerning the care, custody, and control of one's own children "is one of the oldest fundamental rights protected by the Due Process Clause [of the Fourteenth Amendment]," *id.* at 358, 904 A.2d at 885 (citing *Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000)), this Court determined that any infringement of such right requires strict scrutiny review to determine whether the infringement is supported by a compelling state interest and if the infringement is narrowly tailored to effectuate that interest. *See Hiller,* 588 Pa. at 359, 904 A.2d at 885-86. In applying strict scrutiny to Section 5311 and finding it constitutional, the Court identified the compelling state interest for grandparent partial custody or visitation under Section 5311 as the state's "longstanding interest in protecting the health and emotional welfare of children," under the state's *parens patriae* interest. *See id.* at 359, 904 A.2d at 886. Section 5311 was narrowly tailored to serve that interest, the Court held, because it extends standing to seek partial custody or visitation "not merely to grandparents, but to grandparents whose child has died." *Id.* Additionally, the Court noted that:

> This limitation . . . furthers our General Assembly's express public policy to assure the "continuing contact of the child or children with grandparents when the parent is deceased, divorced or separated." 23 Pa.C.S. § 5301. Moreover, the rational behind the stated policy is clear: in the recent past, grandparents have assumed increased roles in their grandchildren's

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personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

23 Pa.C.S. § 5311.

> lives and our cumulative experience demonstrates the many potential benefits of strong inter-generational ties.

Id. at 360, 904 A.2d at 886 (citing *Troxel,* 530 U.S. at 64, 120 S.Ct. at 2059). In view of such interest, the Court found the statute to be narrowly tailored in that it required the court to ensure that the partial custody and visitation granted would not interfere with the parent-child relationship, consider the pre-petition relationship and prior willingness of the parent to provide access to the child without a court order, and determine that such grant would serve the best interests of the child. *See id.* at 361, 904 A.2d at 887. Additionally, under relevant case law, the courts must afford a presumption in favor of the parent's determination of custody that meaningfully tips the balance in her favor. *See id.* at 362-63, 904 A.2d at 887-88.

The present case was addressed in the trial court on equal protection grounds as opposed to substantive due process principles and involved Section 5312 of the Domestic Relations Code, as opposed to Section 5311, which was the subject of *Hiller.* In this context, however, the substantive due process and equal protection inquiries are essentially identical. In this regard, both inquiries employ a threshold assessment concerning the weight to be ascribed to the parental interest to determine the appropriate level of scrutiny, and both employ a balancing formulation in the application of such scrutiny in which the government's interest is tested, on the one hand, to determine whether it represents an acceptable infringement on the parental interest (for purposes of substantive due process), and on the other hand, whether it is sufficient to support a particular classification (for equal protection purposes). Additionally, Sections 5311 and 5312, addressing grandparent

visitation and partial custody in circumstances involving the death of a parent and divorce, respectively, are both concerned with protecting the health and emotional welfare of children under the state's *parens patriae* interest in circumstances where the child's family continuity is disrupted. Finally, in *Hiller,* Section 5311 was able to withstand the due process challenge only because the statute employs a classification scheme restricting its reach to a limited class of grandparents (those whose children have died) – in other words, the classification was at the heart of the determination that the statute was narrowly tailored to serve the compelling state interest in protecting the health and emotional welfare of children. *See Hiller,* 588 Pa. at 359-60, 904 A.2d at 886. Thus, we find the *Hiller* decision to be highly relevant in the present context.[5]

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[5] In response to Mr. Chief Justice Cappy's assertion that we have improperly intermixed equal protection and due process principles, we are not alone in recognizing the substantial overlap in the application of these respective constitutional precepts relative to statutes that rely upon classifications, such as Sections 5311 and 5312 of the Domestic Relations Code. *See, e.g., Bearden v. Georgia,* 461 U.S. 660, 666-67, 103 S.Ct. 2064, 2069 (1983) (highlighting the substantial similarity between determining whether a particular classification may be used in taking governmental action consistent with equal protection and assessing whether it is fundamentally unfair to take such action under substantive due process, as arising in the context of parole revocation decisions based upon the failure to pay fines by indigents). *See generally Goulart v. Meadows,* 220 F.Supp.2d 494, 500 (D.Md.2002) ("Modern substantive due process analysis is generally understood to overlap considerably with equal protection analysis." (citing JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 (5th ed. 1995)); *Lofty v. Richardson,* 440 F.2d 1144, 1147 (6th Cir. 1971) ("As to an assertion of an arbitrary classification argument, there is a wide area of overlap between the effect of the Fifth Amendment's due process clause and the

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Here, Mother challenges as a violation of her equal protection rights the classification between intact and non-intact families under Section 5312. Given the role allocated to such classification in authorizing an infringement on a parent's fundamental right to make child-rearing decisions, for the reasons elaborated more fully in *Hiller,* it is clear that the trial court correctly applied strict scrutiny. *See generally Smith v. Coyne,* 555 Pa. 21, 29, 722 A.2d 1022, 1025 (1999) ("Strict scrutiny is applied to classifications affecting a suspect class or fundamental right."); *see also Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 1914 (1988). Thus, initially the court appropriately centered the focus upon whether the classification is necessary to serve the Commonwealth's *parens patriae* interest and whether the means used are narrowly tailored to effectuate the state purpose. *Khan v. State Bd. of Auctioneer Examiners,* 577 Pa. 166, 184, 842 A.2d 936, 947 (2004).[6] Consistent

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Fourteenth Amendment's equal protection clause." (citing *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693 (1954)).

[6] In both the equal protection and substantive due process settings, strict scrutiny has been framed by the courts in various ways, but its most common formulation centers squarely on the main conception of "narrowly tailored measures that further compelling government interests." *Johnson v. California,* 543 U.S. 499, 505, 125 S.Ct. 1141, 1146 (2005). The Chief Justice effectively appears to elevate the phrase "necessary to a compelling state interest" that has sometimes been used in describing strict scrutiny into an "only means" test for equal protection that differs from the application of strict scrutiny in due process analysis. *See* Dissenting Opinion, *slip op.* at 4 (Cappy, C.J.). Such an asserted distinction is faulty, however, in the first instance, because the courts have employed the same phraseology in both the equal protection and substantive due process contexts. *Compare Khan,* 577 Pa. at 184, 842 A.2d at 947 (describing the test for strict scrutiny for purposes of substantive due process as whether legislation "is *necessary to* promote a compelling state interest and is narrowly tailored to effectuate that state purpose." (emphasis added)), *with Commonwealth v. Bell,* 512 Pa. 334, 344, 516 A.2d 1172, 1178 (1986) (explaining, in the equal

(Continued on following page)

with *Hiller,* however, we believe that in applying this test the trial court ascribed insufficient weight to the government's interest in the children's well-being, in the context of this narrowly-tailored statute addressing grandparent involvement in non-intact families.

In this regard, the classification under Section 5312 is not based on antagonism against non-intact families, but, like Section 5311, reflects circumstances where the child's family environment has been disturbed. *Accord Seagrave v. Price,* 79 S.W.3d 339, 344 (Ark. 2002) ("Because the differences in the circumstances between married and divorced parents established the necessity to discriminate between the classes, the [grandparent visitation] statute at issue would not be found unconstitutional.");[7] *Blixt v. Blixt,* 774 N.E.2d 1052, 1064 (Mass. 2002) (holding that, under strict scrutiny, a grandparent visitation statute did not violate equal protection principles, given legislative

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protection setting, that strict scrutiny entails consideration of whether a classification is "*necessary to* the achievement of a compelling state interest" (emphasis added)). Moreover, in neither context do we believe that the essential inquiry amounts to an only means test.

[7] In *Seagrave,* on consideration of a grandparent visitation statute analogous to Section 5312, the Supreme Court of Arkansas found that the classification between a married parent and unmarried parent was not based on a suspect classification, and therefore, was subject to rational basis review to determine whether the classification has a rational basis that was reasonably related to a legitimate government purpose. *Seagrave,* 79 S.W.3d at 343. The court did not specifically address whether the classification burdened a fundamental right, noting that it could apply to situations where the child was in the custody of someone other than the child's natural or adoptive parents. *See id.* Ultimately, however, the court determined that the Arkansas statute had been unconstitutionally applied because the trial court had failed to apply any presumption in favor of the custodial parent's decision regarding visitation. *See id.* at 345.

recognition that children of unmarried or separated parents may be at heightened risk for certain kinds of harm when compared with children of intact families); *see also Curtis,* 542 Pa. at 261-68, 666 A.2d at 271-74 (Montemuro, J., dissenting) (discussing the impact of divorce upon children).[8] Recognizing the *parens patriae* interest in the child's wellbeing and heightened risk of harm arising from the breakdown of a marriage, the classification under Section 5312 is directly and narrowly tailored to such breakdown, and only provides for visitation or partial custody to a grandparent in limited circumstances, similar to the limitations under section 5311 and discussed in *Hiller.*

Notably, Section 5312 requires the court to consider the pre-petition contact between the grandparent and child, and thereby respects the existence or absence of any relationship between them, and the prior willingness of the parent to foster such a relationship without a court order. *See* 23 Pa.C.S. §§ 5311-5312; *Hiller,* 588 Pa. at 361, 904 A.2d at 887; *accord Blixt,* 774 N.E.2d at 1064 (noting that grandparent visitation "has everything to do with protecting the

[8] In *Curtis,* this Court found unconstitutional a statute that authorized the court to order a separated, divorced, or unmarried parent to provide for post-secondary, i.e. college, education of his or her child. *See Curtis,* 542 Pa. at 258, 666 A.2d at 269. Determining that there was no entitlement to participate in such education, *see id.* at 268, the Court found no rational basis to provide only adult children of divorced parents such a benefit. *See id.* at 258-59, 666 A.2d at 269-70. Here, of course, the statute is directed to the custodial arrangement of a minor, of which the state has a *parens patriae* interest, and the harm to be protected against, disruption of a child's family environment, directly and necessarily flows from the circumstances covered by the classification at issue. Consequently, the focus is on whether the means used are narrowly tailored to promote such interest. *See Khan,* 577 Pa. at 184, 842 A.2d at 947.

child, insofar as possible, by preserving the fruits of significant developmental attachment whose seeds were planted by a parent").[9] Additionally, prior to granting a grandparent access to the child, the trial court must ensure that such grant will not interfere with the parent-child relationship, determine that such grant serves the best interests of the

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[9] Madame Justice Baldwin draws a distinction between the situation involving the death of a parent under Section 5311 and divorce under Section 5312 in terms of the balancing of the respective interests involved. *See* Dissenting Opinion, *slip op.* at 4 (Baldwin, J.). Her conclusion appears to be that, although the Court declined in *Hiller* to condition grandparent visitation upon a constitutional threshold of parental unfitness or harm, *see Hiller*, 588 Pa. at 365-66 & n.24, 904 A.2d at 890 & n.24, such a requirement is appropriate to the divorce scenario. *See Dissenting Opinion, slip op.* at 4-8.

This Court recognized in *Hiller* that the trauma accompanying the death of a parent is substantial, and we recognize here that the effects of divorce, including the potential for ongoing disharmony between parents, may also be highly traumatic. *See, e.g.*, Jack Arbuthnot, *Courts' Perceived Obstacles to Establishing Divorce Education Programs*, 40 FAM. CT. REV. 371, 371 (2002) (discussing a "growing awareness by academics, mental health professionals, community service providers, and court personnel alike that divorce can have devastating effects on those family members least empowered to protect themselves – the children"). There is no record that would enable us to gauge a qualitative or quantitative distinction between the impact of death and divorce of parents upon affected children, and we believe that it exceeds the realm of our judicial expertise to attempt to draw one.

Finally, Justice Baldwin's appears to conflate merits review concerning Grandparents' ultimate entitlement to relief, which is not before us, with the threshold issue of whether Section 5312 is facially unconstitutional, with which we are now presented. In doing so, Justice Baldwin incorrectly suggests that we have ignored the presumption in favor of a fit parent (when we have specifically indicated that such presumption must be given full effect in a merits assessment), and concludes that Grandparents have failed to overcome the presumption (although they have not had the opportunity to do so, because their petition was dismissed by the trial court based on its determination that Section 5312 was facially unconstitutional). *See* Dissenting Opinion, *slip op.* at 7-8.

child, *see* 23 Pa.C.S. §§ 5311-5312, and afford special weight and deference to a parent's decision regarding such access. *See Hiller,* 588 Pa. at 361, 904 A.2d at 887. Moreover, any grant of partial custody and visitation must be reasonable. *See* 23 Pa.C.S. § 5312.[10]

Given the statute's focus on the protecting the child upon the breakdown of a marriage, and the limited circumstances in which it applies, that are directed toward promoting the welfare of the child and limiting the intrusion upon the parent, we find that the classification under Section 5312 is valid, upon the application of strict scrutiny. As such, Mother has not satisfied the heavy burden of establishing that the statute clearly, palpably, and plainly violates the Constitution. Accordingly, the order of the common pleas court is reversed, and the case is remanded for further proceedings consistent with this opinion.[11]

Messrs. Justice Eakin, Baer and Fitzgerald join the opinion.

Mr. Chief Justice Cappy files a dissenting opinion.

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[10] In its opinion, the trial court highlighted that Grandparents could be afforded access to the children during Father's periods of custody. This factor may bear upon the merits of a court's ultimate best interests and reasonableness determinations. It should be noted, however, that in other cases access through a parent may not be possible, such as when a parent has relocated, is incarcerated, or has been denied partial custody due to circumstances beyond the grandparents' control.

[11] Although the trial court did not address Mother's claim that the statute violated her constitutional due process rights, for the reasons stated herein, the trial court must obviously consider *Hiller* and our present rationale in finally resolving such claim.

Madame Justice Baldwin files a dissenting opinion in which Mr. Justice Castille joins.

JUDGMENT ENTERED:
June 12, 2007

/s/ Nonna Blynn
Nonna Blynn, Chief Clerk

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY DECIDED: June 12, 2007

I join Justice Baldwin's dissenting opinion to the extent that it concludes that the state has no compelling interest to classify parents by marital status under 23 Pa.C.S. § 3512. Because this is a facial constitutional challenge, I do not join any analysis which delves into the underlying facts of this case but, rather, consider the statute on its face to determine if it creates a permissible classification that survives constitutional scrutiny. I write separately because I believe the majority fails to establish the state's compelling interest in classifying parents according to marital status within the framework of equal protection.

The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. *Commonwealth v. Albert,* 758 A.2d 1149, 1151 (Pa. 2000). The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Id.* There are

different levels of classifications and standards by which classifications are weighed, with the highest level of scrutiny reserved for classifications that burden a suspect class or a fundamental right. *Id.* at 1152. If the classification impinges a fundamental right protected by the Constitution, then it is subject to strict scrutiny. *Id.* (citing *Smith v. City of Philadelphia*, 516 A.2d 306, 311 (Pa. 1986)). A statute containing a classification of this kind will not be entitled to the usual presumption of validity, as the majority asserts. *See Danson v. Casey*, 399 A.2d 360, 372 (Pa. 1979). Rather, the Commonwealth must establish that its interference with a fundamental right is compelled by some legitimate state interest, and that the interference is narrowly tailored to be the least drastic means of accomplishing that objective. *Danson,* 399 A.2d at 372. Strict scrutiny requires that the classification be *necessary* to effectuate the state's compelling interest. *Commonwealth v. Bell*, 516 A.2d 1172, 1178 (Pa. 1986) (emphasis added).

The majority does recognize that parents have the right to make decisions concerning the care, custody and control of their children, and that this is a fundamental right protected by the Due Process Clause. It also properly asserts the state's legitimate interest in the welfare of children. However, the focus of the inquiry under equal protection is the legitimacy of the classification created by the statute. The majority correctly states the law in this area on one hand, but then asserts that the equal protection inquiry is "essentially identical" to an inquiry of substantive due process. *See* Majority Opinion p. 7 *supra.* In fact, the caselaw cited by the majority does not refer to the inquiries as "essentially identical" but rather as "substantially similar" and while it is true that due process and equal

protection involve a substantially similar inquiry in that the concepts are very much alike, the analyses do differ in what I believe to be a critical aspect. Both consider whether the government action is necessary to promote a compelling state interest and is narrowly tailored to effectuate that interest, but substantive due process applies this test to the legislation, whereas under equal protection we apply that test to the classification created by the legislation. *Compare Khan,* 842 A.2d at 947 *with Commonwealth v. Bell,* 516 A.2d at 1178. In other words, strict scrutiny under due process tests the government's interest to determine if the statute represents an acceptable infringement, whereas equal protection, the concept at issue here, considers whether the government's interest is sufficient to support a particular classification. I may seem to quibble over the precise language that the majority chooses to use, however, I believe that there is a real risk that the two inquiries will be conflated. This is problematic because distinct analyses may lead to divergent results. This concern is borne out by a careful reading of *Blixt v. Blixt,* 774 N.E. 1052 (Mass. 2002), a case cited by the majority to support it's contention that the governmental interest here is compelling. In *Blixt,* the Supreme Judicial Court of Massachusetts considered a facial challenge to a grandparent visitation statute similar to our own on both due process and equal protection grounds. *Id.* at 1056. Under due process, the court found that the statute satisfied strict scrutiny because "our construction narrowly tailors it to further the compelling [s]tate interest in protecting the welfare of a child who has experienced a disruption in the family unit from harm." *Id.* at 660. But, although the court recognized the standard of evaluating the classification within the statute when it turned to the equal protection analysis, it did not engage

in any analysis as to how the classification itself served the compelling interest. *Id.* at 1064-65. Instead, the *Blixt* court merely repeated its due process analysis. *Id.* The fact that the two concepts are so substantially similar makes it easy to conflate the two distinct tests. Therefore, in the interests of protecting our constitution and our caselaw, I think it is important that we highlight the small, but important way in which the tests are dissimilar.

As stated above, to come to the conclusion that Section 3512 is constitutional after an equal protection challenge, the majority must show that creating a classification that holds out different groups of parents for disparate treatment according to their marital status is necessary to protect the welfare and safety of children. At this point, I am not persuaded that the majority opinion answers this question. The majority does correctly state the law with respect to a strict scrutiny analysis under equal protection, but then it cites to three cases which are inapt; two from other jurisdictions. In *Seagrave v. Price,* 79 S.W.3d 339 (Ark. 2002), the Supreme Court of Arkansas considers a grandparent visitation statute under rational basis. The majority makes note of this, but does not elaborate on why it is relevant that another state's high court decided that such a statute could survive a far lower and more deferential level of scrutiny than we consider in this case. The same is true of *Curtis v. Kline,* 666 A.2d 265 (Pa. 1995) (Montemuro dissenting), which discusses the impact of divorce on children in the context of rational basis review. The only case which appears to be on point is *Blixt,* which as I detail above, includes an equal protection inquiry which collapses into a due process resolution.

Having listed these cases, the majority simply concludes that "Section 5312 is directly and *narrowly tailored*

to such breakdown" without proffering any independent analysis as to how classifying parents by marital status is necessary to protect the compelling interest of the state. Under an equal protection analysis, it is incumbent upon this Court to first find the classification to be necessary to a compelling state interest. The majority does not meet this burden.

I assert that it is not necessary to group parents into categories based on their marital status in order to protect the best interests of children because the fact of divorce or separation alone is not a proxy for determining which parents might cause their children harm. In other words, classifying parents by marital status does not necessarily divide the children at risk from their parent's decisions from the children who are not at risk. This classification suggests that divorced or separated parents are inherently less fit to parent, as compared to parents who have married, or to parents who have never married, but who conjugate.[12] No matter what strife might actually ensue within the family unit, the decisions of fit married or cohabiting parents as to custody and care of their children will enjoy special status under Section 3512, but not the parenting decisions of the divorced or separated. This distinction between parents based on marital or quasi-marital status is

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[12] In *Bishop v. Pillar,* 637 A.2d 976 (Pa. 1994) (Opinion Announcing the Judgment of the Court), a plurality of this Court affirmed the Superior Court's construction of Section 3512 to include separated, but never-married parents within the category of "separated" parents subject to the additional state oversight provided by Section 3512. It seems reasonable to conclude then that never-married but cohabiting parents who have not separated remain outside the ambit of Section 3512 alongside married parents due to the fact that their living arrangements create a quasi-marital relationship.

arbitrary. Marital status alone can never serve as an indication of parental fitness. Without making any distinction as to marital status, we have held that there is a presumption that parents will act in a child's best interest. *Hiller v. Fausey,* 904 A.2d 875, 890 (Pa. 2006). The classification in Section 3512 would seem to directly contradict this presumption and suggest that divorced or separated parents are necessarily in need of heightened state supervision when they make their parenting decisions.

Furthermore, this case is distinguishable from this Court's decision in *Hiller,* 904 A.2d at 875. There, this Court considered an as applied challenge to a different section of the Domestic Relations Code which allows grandparents to petition for custody when one parent is deceased. 23 Pa.C.S. § 5311. That statute classified parents into two groups. One group where both parents were alive, and the other, where one parent had died. This Court found that these two groups of parents were not similarly situated and that the classification was necessary to the compelling state interest of the welfare of children. This Court found that where one parent is deceased, the child might be at risk of loosing his or her connection to the grandparents from the deceased parent's side of the family. In that case, the classification did serve as a proxy for determining what children stood at risk of that particular type of harm and survived strict scrutiny, as applied to those particular facts, because the classification itself was necessary to effectuate a compelling government interest.

But unlike the situation in *Hiller,* separating the married or cohabiting from the divorced or separated is not a substitute for determining which parents might cause their children harm. Section 3512, which creates a

classification that distinguishes between married or cohabiting and divorced or separated parents, does not necessarily serve the state's compelling interest in the welfare of children and, therefore, I believe that it cannot withstand strict scrutiny.

Accordingly, I would affirm the order of the Court of Common Pleas.

DISSENTING OPINION

MADAME JUSTICE BALDWIN DECIDED: June 12, 2007

The Majority concludes that the trial court failed to accord proper weight to the interest of the State in the underlying action and that Section 5312[13] of the Domestic Relations Code regarding grandparent custody and visitation survives a constitutional challenge on equal protection grounds. I respectfully dissent. Section 5312 of title 23 violates the Equal Protection provisions of the Fourteenth Amendment to the U.S. Constitution and Article 1, §§ 1 & 26 of the Pennsylvania Constitution. Therefore, I would

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[13] Section 5312 provides:

> In all proceedings for dissolution, subsequent to the commencement of the proceeding and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.

23 Pa.C.S. § 5312.

affirm the decision of the Court of Common Pleas of Berks County.

In *Commonwealth v. Albert,* 563 Pa. 133, 139, 758 A.2d 1149, 1152 (2000) (internal citations omitted) we set forth the following with respect to equal protection:

> The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation. Judicial review must determine whether any classification is founded on a real and genuine distinction rather than an artificial one. A classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification.

In the instant case, section 5312 discriminates between married parents and divorced parents, permitting a heightened level of state intervention with respect to

parents who are divorced. The majority relies on our recent decision in *Hiller v. Fausey,* 588 Pa. 342, 904 A.2d 875 (2006) in support of its conclusion that the classification created by section 5312 passes constitutional muster. In *Hiller,* this Court was called upon to determine whether Section 5311 of the Domestic Relations Code could survive a due process challenge where the parent of the child's deceased mother sought visitation rights and partial custody. Section 5311 was determined to interfere with the fundamental right of a parent to control the upbringing of his or her child, and consequently, we recognized that a strict scrutiny analysis must be applied. The appropriate test therefore required a determination that the constitutional infringement was supported by a compelling state interest and that the infringement was narrowly tailored to effectuate that interest. We concluded in *Hiller* that the state possessed a compelling interest in the health and welfare of children, and that section 5311 narrowly limits those who can seek visitation or partial custody not merely to grandparents, but specifically to grandparents whose child has died. *Hiller,* 904 A.2d at 885-90. We further reasoned that section 5311 protected the father's right to raise his son as he saw fit by, among other things, providing a presumption in favor of the father's decisions and requiring that visitation rights not interfere with the parent-child relationship. *Id.*

Relying on *Hiller,* the majority in the instant case finds that the State has a compelling interest in distinguishing between married and divorced parents because of the disruption of the intact family by divorce. I respectfully disagree. *Hiller*'s result required both the procedural protections afforded by Section 5311 and its application to

a situation when a parent has died.[14] As we explained in *Hiller*:

> We cannot conclude that . . . a benefit always accrues in cases where grandparents force their way into grandchildren's lives through the courts, contrary to the decision of a fit parent. In contrast, however, we refuse to close our minds to the possibility that in some instances a court may overturn even the decision of a fit parent to exclude a grandparent from a grandchild's life, especially where the grandparent's child is deceased and the grandparent relationship is long-standing and significant to the grandchild.

Id. at 886-87. Thus, the analysis in *Hiller* does not necessarily apply beyond the exceedingly narrow circumstance where a parent has died and the grandparent had a significant relationship with the child.

The instant appeal involves an examination of a different subsection of the grandparent custody and visitation statute in the context of a different set of facts. Specifically, unlike *Hiller,* we are dealing with a divorced family with living parents who have different opinions as to the children's visitation with their grandparents. I believe this alters the landscape considerably, for I cannot accept that divorce alone diminishes the fundamental interest of parents who are making caretaking decisions. In particular, I do not believe that the statute can survive the scrutiny involved in comparing two otherwise fit

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[14] We found section 5311 clearly distinguishable from the statute at issue in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054 (2000). The statute in *Troxel* gave standing to any person at any time. However, section 5311 is limited to grandparents whose child has died.

parents who happen to be divorced to two similarly situated parents who are not divorced. In the instant case, the section 5312 classification of parents as married or divorced does not provide a real and genuine distinction upon which to permit state interference with the fundamental right of parents to direct the upbringing of their children. If Father lived with Mother, the present controversy would not be before this Court. While divorce, by necessity, permits the State to intervene to resolve immediate and direct disputes that arise between parents over custody and visitation, divorce is not the *sine qua non* of a compelling state interest when non-parents seek to challenge parental decision-making.

The majority has failed to identify a compelling reason to discriminate between married and divorced parents. Although the state has a longstanding interest in protecting the health and emotional welfare of children, that interest is not implicated merely as a result of divorce proceedings. While divorce opens the door for courts to resolve disputes between parents, it does not make parents unfit to make decisions that are in the best interests of their children. Divorce proceedings alone do not threaten the health, safety, morals or welfare of children to constitute a compelling reason for state interference. I believe that permitting the state to inject itself into a dispute between two fit parents involving grandparent visitation violates the grounding premise of *Hiller* and *Troxel,* that fit parents are accorded a presumption in favor of their decisions regarding their children. The heightened protection of this valued fundamental interest, recognized in both *Hiller* and *Troxel,* should not be altered by the marital status of otherwise fit parents, and the Commonwealth should be held to no lesser standard for

intervention. In *Hiller* we found Section 5311 narrowly tailored to serve the state's compelling interest in children's health and welfare when one parent is deceased. We did not find that the desire of the State to foster close relationships between grandparents and grandchildren *alone* was sufficient to justify court-ordered visitation and custody over the objection of a fit parent.

While the Commonwealth has a compelling interest in protecting the well-being of its children, particularly in matters of health and safety, this legitimate and compelling interest does not extend to all things that might be beneficial to children nor confer upon the Commonwealth the power to intrude upon the decisions of a fit parent. The Commonwealth may intervene when preventing injury, abuse, trauma, exploitation, severe deprivation, or other comparable forms of significant harm. The United State Supreme Court has indicated that in certain limited arenas, such as compulsory education and compulsory vaccination, the State may contravene the decisions of a fit parent. *Meyer v. Nebraska,* 262 U.S. 390, 402, 43 S.Ct. 625, 627 (1923) (commenting that "the power of the state to compel attendance at some school . . . is not questioned"); *Jacobson v. Commonwealth of Mass.,* 197 U.S. 11, 25 S.Ct. 358 (1905) (upholding state compulsory vaccination); *accord In re Walker,* 179 Pa. 24, 36 A. 148 (1897); *Rhoades v. Sch. Dist. of Abington Twp.,* 226 A.2d 53, 60, 424 Pa. 202, 212 (1967). Further, some states have found it necessary to oppose the decisions of a parent involving medical treatment for life-threatening situations. *See, e.g., Matter of McCauley,* 409 Mass. 134, 565 N.E.2d 411 (1991); *Walker v. Superior Court,* 47 Cal.3d 112, 763 P.2d 852 (1988); *People in Interest of D.L.E.,* 645 P.2d 271 (Colo. 1982). However, the State does not gain a compelling

interest in supervising the upbringing of a child when both parents are living, albeit divorced. "[M]ere improvement in quality of life is not a compelling state interest and is insufficient to justify invasion of constitutional rights. So long as a family satisfies certain minimum standards with respect to the care of its children, the state has no interest in attempting to 'make things better.'" *King v. King,* 828 S.W.2d 630, 634 (Ky.1992) (Lambert, J. dissenting).

Section 5312, at issue in the instant case, requires consideration of the best interests of the child, the impact on the parent/child relationship, and an established relationship between grandparent and grandchild. 23 Pa.C.S. § 5312. Healthy relationships with grandparents unquestionably benefit children. However, the fact that such relationships are desirable does not permit the State to force them upon children contrary to the wishes of a fit custodial parent merely because that parent happens to be divorced. The Majority Opinion is jurisprudentially irreconcilable with both *Troxel* and *Hiller.* The Majority finds that the statute survives strict scrutiny because (1) the government has a compelling interest in children's well-being and preventing the "heightened risk of harm" caused by the dissolution of a marriage; and (2) the statute is narrowly tailored to further that interest, requiring, *inter alia,* that the court consider the best interest of the child and not interfere with the parent-child relationship. (Majority Opinion, slip op. at 9-10). I fail to see how grandparent visitation is narrowly tailored to further the compelling interest of protecting the children of divorced parents from the perceived detriment caused by the dissolution of the core family unit. Court-ordered grandparent visitation does not significantly further the Commonwealth's interest in helping the children affected by

divorce here because, unlike in *Hiller,* the paternal grandparents can visit their grandchildren during their child's custody time. *See Hiller,* 904 A.2d at 887 ("Unlike the statute in *Troxel,* which extended standing to any person at any time, Section 5311 narrowly limits those who can seek visitation or partial custody not merely to grandparents, but specifically to grandparents whose child has died.")[15] Moreover, there is no allegation that children of divorced or separated parents are so traumatized by divorce or separation that they require the special and exceptional intervention of the Commonwealth. Even if divorce traumatizes children enough for the Commonwealth to acquire a compelling interest to intrude on the family, something more than court-ordered time with grandparents is required to further significantly the Commonwealth's purpose of safeguarding children's welfare.

Section 5312 permits a trial court to interfere too easily in parental decision-making. *Hiller* involved the death of a parent who could no longer ensure that her child was exposed to her family and heritage. That element, which was essential to overcoming the fundamental right of a parent to decide with whom the child associates, is missing here.

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[15] Even *Troxel* emphasized the fact that the grandparents still had access to the children. *See Troxel,* 530 U.S. at 71, 120 S.Ct. at 2063 ("Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely.")

Conclusion

Troxel made it clear that when a forum has been created for a court to consider grandparent visitation, the judge must presume that a fit parent acts in the best interests of his or her children." So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel,* 530 U.S. at 68-69, 120 S.Ct. at 2061. This presumption is not simply applicable to joint decisions of fit married parents but applies to the decisions of all fit parents. *See Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208 (1972) (holding that the state may not interfere with an unwed father's custody rights absent proof of unfitness). It is parental fitness, not mere marital status that gives rise to the presumption. Divorce does not diminish the fundamental interest of a parent in parenting and does not make a father or mother less capable.

The Commonwealth has the power, cloaked in the doctrine of *parens patriae,* to determine in divorce proceedings how, in the best interests of the child, custody should be allocated. However, once this determination is made, *Troxel* indicates that decisions by a fit custodial parent must be accorded the presumption that those decisions are in the best interests of the child. With both parents living, and no showing of parental unfitness or harm to the child, Grandparents have failed to demonstrate that divorce alone overcomes that presumption.

Mr. Justice Castille joins this dissenting opinion.

APPENDIX B

JEAN SCHMEHL and DAVID SCHMEHL Plaintiffs	:	**IN THE COURT OF COMMON PLEAS BERKS COUNTY, PENNSYLVANIA**
VS	:	
ANN WEGELIN and PERRY SCHMEHL Defendants	:	**CIVIL ACTION LAW**
	:	**NO. 05-5526**
	:	**Assigned to: Scott D. Keller**

ORDER

AND NOW, this 14th day of July 2005, it is hereby **ORDERED AND DECREED** that the Complaint filed by Plaintiffs pursuant to 23 Pa. C.S.A. § 5312 is hereby **DISMISSED**. The Court finds that the above provision of the Grandparents Visitation Statute is a violation of the Equal Protection Clause of The Fourteenth Amendment of the United States Constitution and as such is unconstitutional. An opinion in support of this order will follow in due course.

BY THE COURT:

/s/ Scott D. Keller

SCOTT D. KELLER, JUDGE

Distribution:

- ✓**Prothonotary**
- ✓**Computer**
- ✓**Attorney for Plaintiff** [Sharon Gray, Esq.]
- ✓**Plaintiff**
- ✓**Attorney for Defendant** [Gregory D. Henry, Esq.]
- ✓**Defendant**
- ✓**Judge Keller**

✓[Other – Atty General of PA
Hon. Jerry Poppert
16th Floor Strawberry Sq.
Harrisburg, PA 17120
✓Pam Miller Custody Office]

JEAN SCHMEHL and DAVID SCHMEHL Plaintiffs	:	**IN THE COURT OF COMMON PLEAS BERKS COUNTY, PENNSYLVANIA**
VS	:	
ANN WEGELIN and PERRY SCHMEHL Defendants	:	**CIVIL ACTION LAW**
	:	**NO. 05-5526 CUSTODY**
	:	**Assigned to: Scott D. Keller**

Sharon Gray, Esquire
Attorney for the Plaintiffs

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OPINION IN SUPPORT OF THIS COURT'S FINDING THE GRANDPARENTS VISITATION ACT, 23 Pa.C.S.A. §5312, VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION S.D. KELLER [/s/ SDK], J., July 29, 2005

STATEMENT OF THE CASE

Mother (Ann Wegelin) and Father (Perry Schmehl) were married on January 4, 1992 in Berks County, Pennsylvania. Two children, Sara A. Schmehl (born 11/6/98) and Samuel C. Schmehl (born 3/17/95), were born of the marriage. By decree dated April 11, 2003, the parties were divorced. On November 13, 2002, the court entered a custody order by which the parties are operating under to this date.

On April 29, 2005, the plaintiffs, paternal grandparents, filed a custody action against Mother, as Mother would not allow the children to visit with paternal grandparents. On May 5, 2005, Mother filed preliminary objections to grandparents' custody action. On May 11, 2005,

Paternal Grandparents filed an amended custody action naming father as a defendant and the parties agreed he was a necessary party to the suit.

On May 25, 2005, Mother filed a praecipe for argument court, alleging that 23 Pa.C.S.A. §5312 is unconstitutional and on the same date filed the required notice to the Attorney General per PaRCP rule 235. On June 27, 2005, the plaintiffs field their answer and brief in response to Mother's action alleging unconstitutionality of 23 Pa. C.S.A. §5312. This Court set a hearing date for July 11, 2005 on the constitutional challenge as well as the date for the defendant's petition for special relief, which was unrelated to the constitutional challenge. The Plaintiffs are divorced grandparents and the Defendant, Perry Schmehl, their son, is in agreement with visitation with the grandparents.

After argument heard, and upon review of both plaintiffs' and defendant's briefs, this Court entered an Order on July 14, 2005 finding that 23 Pa.C.S.A. §5312 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and dismissed the plaintiffs' complaint for custody.

CONSTITUTIONALITY OF 23 Pa.C.S.A. §5312

This Court finds that 23 Pa.C.S.A. §5312 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment to the United States Constitution guarantees that "no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." However, the Pennsylvania Supreme Court has stated "the prohibition against treating people differently

under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation." *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265, 267-68 (1995). When the classification burdens a fundamental right, the strict scrutiny test must be applied: the classification must be necessary to a compelling governmental interest.

The statute at issue, deemed the Grandparent's Visitation Act, provides three provisions for grandparents' custody and visitation rights:

a. 23 Pa.C.S.A. §5311: when a parent is deceased;

b. 23 Pa.C.S.A. §5312: when parent's marriage is dissolved or parents are separated;

and

c. 23 Pa.C.S.A. §5313: when grandparents may petition.

The section of the act specifically at issue in this case is section 5312, which provides:

> In the proceedings for dissolution, subsequent to the commencement of the proceedings and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The Court shall consider the amount

> of personal contact between the parents or grandparents of the party and the child prior to the application.

It is clear that §5312 of the Grandparent's Visitation Act has created a classification: namely a parent who is married and resides with her spouse or is unmarried and lives with their child's parent has unfettered discretion in who their children are permitted to associate, however, parents that are separated and/or divorced, do not have this unfettered right and the court system may intervene.

It is also clear that the right to be protected in this case is a fundamental right: "The United States Supreme Court has stated that the right of parents to make decisions about the upbringing of their children is a fundamental right." *Fausey v. Hiller*, 851 A.2d 193, (Pa.Super. 2004). "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.*, citing *Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). In relation to the Grandparents Visitation Statute at issue, the Superior Court discussed this fundamental right and has found that when parents are married or are not married, but are living together, Grandparents do not have standing to file for partial custody or visitation rights. *See Herron v. Seizak*, 321 Pa.Super. 466, 468 A.2d 803 (1983) and *Welsh v. Welsh*, 21 D&C 4th (1993).

From the foregoing, then, it becomes clear that the Grandparent's Visitation Act creates a classification, and interferes with a parent's fundamental right to determine with whom their children associate. The pertinent question then becomes is there a compelling governmental

interest that justifies this intervention and classification. This Court finds that there is not.

The Superior Court has not yet determined whether 23 Pa.C.S.A. §5312 is constitutional under Equal Protection Clause of the Fourteenth Amendment, however, the Pennsylvania Supreme Court and Superior Court have discussed Equal Protection issues of relative importance to the issue at hand.

The Pennsylvania Supreme Court has discussed an Equal Protection issue in terms of whether the legislature had a legitimate interest in treating the children of separated, divorced or unmarried parents differently than children of married parents for purposes of funding their children's college education. *See Curtis v. Kline*, supra. In that case, the statute was struck down as the legislature did not have a legitimate interest in classifying the children as it did.

Unlike our case, where the right to be protected is a fundamental right, the right protected in the *Curtis* case, the right to a college education, is not a fundamental right. In the *Curtis* case, the statute would be upheld "if there is any rational basis for the classification" and in the present matter the statue can be upheld if the "statute us strictly construed in light of a compelling g governmental purpose." This is significant, in that, although the subject matter is different, the classification in the two cases is similar: intact families are treated differently than separated or divorced parents and their children. The statute creating a classification by permitting the court to order separated or divorced parents to provide equitably for educational costs, where parents of in-tact families did not have to provide for secondary education, did not withstand

a rational basis test, therefore, the similar statute classification here, permitting the court to order a divorced or separated parent to permit their child(ren) to visit with their grandparents, while in-tact families can make the decision without court interference, certainly cannot be said to withstand the strict scrutiny test.

The Superior Court has reviewed an Equal Protection issue under the Grandparent's visitation Statute in terms of 23 Pa.C.S.A. §5311. The Superior Court addressed whether 23 Pa.C.S.A. section 5311 violated the Equal Protection Clause of the Fourteenth Amendment in *Faussey v. Hiller*, supra. In that case, the Superior Court found that section 5311 did not violate the Due Process or the Equal Protection Clause of the Fourteenth Amendment. In *Faussey*, the Superior Court determined that to the extent section 5311 treats children differently who have lost a parent to death than those children who have not, it is for the "justified and reasonable purpose of protecting a child's emotional well-being and accounting for the potentially different needs of a child whose parent has died." *Faussey*, supra. "The compelling purpose behind §[5311] is to foster the emotional welfare of children. The statute treats children from intact families differently from children who have experienced the death of a parent. That classification makes perfect sense because it is precisely in those cases where the danger of alienation from a grandparent is greatest." *Faussey*, supra, citing Trial Court Opinion at 17.

Our case is significantly different from one in which a parent dies. This Court agrees that, in that situation, there is a compelling governmental interest for the child to continue a relationship with both sets of grandparents, because without the deceased parent able to provide a

connection for their child with their parent, the surviving parent could easily keep the child away from the deceased partner's parent(s). A child in that situation needs as much emotional support as possible from their remaining parent, but also from their grandparents. In our case, both parents are living, and therefore they have the fundamental right to make the determination of with whom their children will associate with. This Court does not see that a compelling governmental interest exists to treat separated parents who are still both alive and still fit to make decisions regarding their children, any differently than two parents that are still together. Although the parents are not together, it does not logically follow that state intervention is necessary. Both parents remain and, during periods of their partial custody with the children, either parent can provide access to their parents. There is no compelling reason that this court can see for the state to require that Mother give up more of her time with the children, so that Father's parents can have their own periods of visitation separate from visitations while Father has custody. Additionally, this Court is mindful of the stress of court ordered partial custody/ visitation schedules upon children. There is no compelling reason, in fact it would create the potential for greater harm, if a child of separated/divorced parents would be subject to, in this case, 2 more potential periods of Court ordered partial custody/visitation. A child of an intact family has freedom to live their life as a child, absent court ordered scheduling of their time. There is no reason to burden a child of separated/divorced parents with more court ordered interference in their already restricted childhood. Their parents can make sure there is contact with the grandparents.

As a result of the foregoing, this Court finds that 23 Pa.C.S.A. §5312 violates the Equal Protection Clause of the Fourteenth Amendment. It has not been established that there is a compelling governmental interest for classifying married parents or parents residing together differently than separated or divorced parents, or children of the respective classes differently, when the government is clearly interfering with the parents' fundamental right to care, custody and control of their children and the children's right to have minimal court ordered restrictions on their time.

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No. 07-322

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ANN WEGELIN,

Petitioner,

v.

JEAN and DAVID SCHMEHL,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Pennsylvania Supreme Court properly find that application of 23 Pa. C.S.A. Section 5312 does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

LIST OF PARENT COMPANIES AND SUBSIDIARIES

None.

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REASONS FOR DENYING THE WRIT OF CERTIORARI

I. SUBSTANTIVE DUE PROCESS - PENNSYLVANIA SUPREME COURT FOUND APPLICATION OF 23 Pa. C.S.A. SECTION 5312 DOES NOT VIOLATE A PARENT'S FUNDAMENTAL LIBERTY RIGHT TO CONTROL THEIR CHILDREN

The Grandparents Visitation Statute 23 Pa. C.S.A. Section 5312, does not violate the fundamental right of parents to control their children. The Fourteenth Amendment provides for heightened protection against intrusion and governmental interference with certain fundamental rights and liberty interests. "Equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." *Love v. Borough of Stroudsburg,* 528 Pa. 320, 328, 597 A.2d 1137 (1991). "Thus, as the state constitution provides no broader protections than the federal constitution in the area of equal protection analysis, it is unnecessary to provide a separate analysis under each constitution." *Paz v. Pennsylvania Hous. Fin. Agency, Homeowners Emergency Mortg. Assistance Loan Program,* 722 A.2d 762, 766, 1999 Pa. Commw. LEXIS 5 (1999).

The relevant clause of the Federal Constitution states "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Section 1. The analogous provision in our State Constitution is the following:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. Art. I, Section 1.

Here, the substantive due process analysis involves the protection of privacy rights within the family unit, a right fiercely protected under the Federal Constitution. Care, control and custody of one's own children falls into the penumbra, or zone of privacy that the Supreme Court discusses in a line of cases that define and refine this liberty interest. *See Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (Court states "The liberty interest guaranteed by the Fourteenth Amendment includes freedom to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . "); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (law prohibiting parents from sending children to private as opposed to public schools unconstitutional because it would "unreasonably interfere with the liberty of parents . . . to

direct the upbringing and education of [their] children . . . ").

In *Moore v. City of East Cleveland,* 431 U.S. 494, 499, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion), it was stated "This Court has long recognized that freedom of personal choices in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."; *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674 (1992) (plurality opinion) recognizing "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."

"[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." *Fausey v. Hiller,* 851 A.2d 193 (Pa. Super. 2004), *citing Troxel v. Granville,* 530 U.S. 57, 67, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The right to rear one's child is heavily protected by federal constitutional jurisprudence. Parental rights have been described in reference to the Constitution as being an unenumerated right. *Troxel* at 91-92 (Scalia, J., dissent).

The Schmehl's filed for partial custody or visitation under 23 Pa. C.S.A. Section 5312, which allows for grandparents to petition the court for visitation under the following circumstances: When parents'

marriage is dissolved or parents are separated. The statute states:

> In the proceedings for dissolution, subsequent to the commencement of the proceedings and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The Court shall consider the amount of personal contact between the parents or grandparents of the party and the child prior to the application.

The statute does not confer a right to visitation with grandchildren; it only authorizes a petition to the court. "Our review of the language of 23 Pa. C.S.A. Section 5312 convinces us that it is both clear and unambiguous. The "grandparents" of a child who are divorced or involved in dissolution proceedings may maintain an action for partial visitation or partial custody." *Hill v. Hill,* 425 Pa. Super. 355, 625 A.2d 642, 648 (1991).

The request is only granted if visitation is deemed to be in the best interest of the children, the grandparents bear the burden of persuasion on the issue. "It is well established in Pennsylvania that custody and visitation matters are to be decided on the basis of the judicially determined "best interests

of the child standard, on a case-by-case basis, considering all factors which legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well-being." *Hicks v. Hicks,* 2005 Pa. Super 58, 868 A.2d 1245, 2005 Pa. Super. LEXIS 147, 2005 WL 332769, 2 (Pa. Super. 2005) *citing Zummo v. Zummo*, 394 Pa. Super. 30, 574 A.2d 1130, 1142 (Pa. Super. 1990). Even when the burden is met, the trial court still has the discretion as to grant or deny the request based on the individual circumstances.

A party challenging the constitutionality of a statute carries a heavy burden of persuasion. *Department of Transportation v. McCafferty,* 563 Pa. 146, 155, 758 A.2d 1155, 1160 (2000). It is well settled that one bears a heavy burden when he seeks to establish that a statute is constitutionally defective. "A statute duly enacted by the General Assembly is presumed valid and will not be declared unconstitutional unless it "*clearly, palpably* and *plainly* violates the constitution," *Purple Orchid v. Pennsylvania State Police,* 572 Pa. 171, 178, 813 A.2d 801, 805 (2002). *See also* 1 Pa. C.S.A. Section 1922(3). The Pennsylvania Supreme Court has held that Section 5312 does not violate the Constitution as written.

In the present case the parents were divorced in 2003, and natural father has court ordered visitation. Father, the non-custodial parent supports and maintains a healthy relationship with his children. He believes that the children maintaining visitation with his parents is in the best interest of his children, and

believes it will not interfere with the parent-child relationship.

Not only are the grandparents' interests at stake, but the non-custodial parent, the father's rights are also jeopardized by this constitutional challenge. The desire by the father in this case is for his children to know and spend time with his parents. Paternal Grandparents have had a loving relationship with their grandchildren until mother, the custodial parent arbitrarily denied further visitation. "In a grandparent visitation case, the grandparent has the burden to prove that it is in the child's best interest to have 'some time' with the grandparent." *Bishop v. Pillar,* 399 Pa. Super. 52, 56, 581 A.2d 670, 672 (1990). Grandparents want the opportunity to show the trial court that visitation will be in the best interests of the children. The trial court dismissed the petition on the facial violation, and grandparents were denied the opportunity to be heard. Grandparents had substantial prior contact with their grandchildren, and believe that continuing contact will not interfere with the parent-child relationship.

The unique, enriching relationship between children and their grandparents should be encouraged, absent a showing of harm to the children. As Judith L. Shandling writes in *The Constitutional Constraints on Grandparents Visitation Statutes*, 86 Colum. L. Rev. 118 (1986):

> Maintenance of grandparent-grandchild ties in the period following the disruption of a

> nuclear family has been shown to be especially beneficial for the children involved, thus, it is much more likely that grandparents will succeed in demonstrating the existence of the constitutionally required "compelling need" in this setting than in the intact family situation . . . if the custodial parent is not the blood relative of the petitioning grandparent, however, that grandparent should be authorized to sue for visitation rights, and a court should grant them when it finds that visitation would be in "the best interests of the child," since there are two different families on opposite ends of the dispute. This situation would arise when a grandparent's child has died, when a grandparent's child is the noncustodial parent following a divorce, or when the parental rights of the grandparent's child have been terminated.

Id. at 135-136.

If court ordered grandparent visitation were to be dictated by the preferences only of the custodial parent, the statute would be rendered meaningless. It would be futile for a grandparent to sue for visitation rights if those rights would ultimately be limited to what a grandparent would receive as a matter of grace from the custodial parent. The mother wants the court to ignore the fact that the other noncustodial parent has rights that are just as important as the custodial parent, and that father also maintains a liberty interest as a fit parent, in deciding how his children will be raised. An argument can be made

that the statute as written can protect the interests of a non-custodial parent questioning the decisions of the custodial parent through challenges to visitation by statutorily defined third parties.

It is clear from the statutory construction that the interest of grandparents in Pennsylvania to visitation under proscripted circumstances was contemplated by the legislature. The will of the legislature is evident, and grandparents accept the burden that they must prove that visitation is in the best interest in this case.

A strong presumption exists that legislation promulgated by the General Assembly is constitutional as written. The basic tenet of statutory construction requires a court to construe the words of a statute according to their plain meaning. 1 Pa. C.S.A. Section 1903(a); *Commonwealth v. Stanley,* 498 Pa. 326, 335, 446 A.2d 583, 587 (1982); *Fireman's Fund Insurance Co. v. Nationwide Mut. Insurance Co.,* 317 Pa. Super. 497, 502, 464 A.2d 431, 434 (1983). When the words of the statute are clear and unambiguous, a court cannot disregard them under the pretext of pursuing the spirit of the statute. 1 Pa. C.S.A. Section 1921(a); *Cortesky v. Board of Commissioners of Butler Township,* 520 Pa. 513, 555 A.2d 72 (1989). In determining the legislature's intent in writing the statute at issue, we presume that the legislature did not intend to violate the state or federal constitution. 1 Pa. C.S.A. Section 1922(3); *Krenzlack v. Krenzlack,* 503 Pa. 373, 381, 469 A.2d 987, 991 (1983). All

doubts must be resolved in favor of a finding of constitutionality. *Parker v. Children's Hospital*, 483 Pa. at 166, 394 A.2d at 937.

Under an Equal Protection challenge, the appropriate level of judicial review must be determined. The standard of review depends on the type of classification at issue. If a state statute or regulation is impairing a fundamental right or a suspect class, the court will apply a strict scrutiny analysis of the statute or regulation. "Where a suspect classification has been made or a fundamental right has been burdened, classification is subject to strict scrutiny." *McCusker v. W.C.A.B.*, 639 A.2d 776, 536 Pa. 380 (Super. 1994). If a statute restricts a fundamental right, it must be examined under strict scrutiny. *Smith v. Coyne*, 722 A.2d 1022, 1025 (Pa. 1999). The objective being pursued by the state must be "compelling" and the means chosen by the state must be "necessary" to achieve that compelling end. Strict scrutiny can be triggered by the implication of a fundamental right, or liberty interest of the parents to have autonomy over the upbringing of their children.

In *Troxel,* the court in a plurality opinion held that the Washington Statute was unconstitutional and infringed upon the mother's parental rights because the statute:

> as applied to Granville and her family in this case, unconstitutionally infringes on

> that fundamental parental right. The Washington nonparental statute is breathtakingly broad. According to the statute's text, "any person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interests of the child." That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parents children to state-court review.

Id. at 68.

In *Troxel,* the statute fails under a strict scrutiny analysis because it is too broad as written. Justice O'Connor further writes:

> . . . we do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Because much state court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.

Id. at 74.

Justice O'Connor carefully crafted the opinion in *Troxel* to specifically hold that the Washington

statute as written was unconstitutional, but does not hold that all non-parental visitation statutes necessarily invoke a due process problem if the statute is written by the legislature to address who is eligible to apply for visitation, and under what circumstances.

The argument one must make to the Court after careful analysis of *Troxel,* is that strict scrutiny is not fatal in fact as applied to visitation statutes under constitutional scrutiny. As long as there are clear, articulated standards as in Section 5312, Pennsylvania courts can regulate these interests if necessary, in a reasonable manner, on petition by a grandparent who fits into the statutory scheme.

In Pennsylvania, the legislature has written a narrowly tailored statute that clearly defines who may apply for visitation, and under what circumstances. The Pennsylvania Supreme Court in *Commonwealth ex rel. Zaffarano v. Genaro*, 500 Pa. 256, 455 A.2d 1180 (1983) stated "the goal in each case is to foster those relationships which will be meaningful for the child, while protecting the child from situations that will have a harmful effect." *Id.* at 260. Grandparents maintain that visitation will be shown to be in the best interests of the children, otherwise under the scheme it will not be granted. Visitation arrangement for short periods of time will not substantially burden the parent-child relationship, and this is contemplated in the statutory scheme.

> Given the statute's focus on protecting the child upon the breakdown of a marriage, and

> the limited circumstances in which it applies, that are directed to promoting the welfare of the child and limiting the intrusion upon the parent, we find that the classification under Section 5312 is valid, upon the application of strict scrutiny.

Schmehl v. Wegelin, 927 A. 2d 183, 194, 2007 Pa. LEXIS 1278 (2007).

For all of these reasons, 23 Pa. C.S.A. Section 5312 does not violate the liberty interests of a parent under the Due Process Clause of the Fourteenth Amendment.

II. EQUAL PROTECTION – A COMPELLING STATE INTEREST EXISTS TO CLASSIFY MARRIED PARENTS, OR PARENTS RESIDING TOGETHER DIFFERENTLY THAN SEPARATED OR DIVORCED PARENTS

The grandparent visitation statute in Pennsylvania does not violate Equal Protection. The statute as written applies only to unmarried children whose parents are in proceedings for dissolution of their marriage, are divorced, or who have been separated for six months or more. 23 Pa. C.S.A. Section 5312. The language is clear and unambiguous. The classification made by the legislature treating non-intact families differently from intact families is permissible.

> "The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly." *Laudenberger v. Port Authority of*

> *Allegheny County,* 496 Pa. 52, 436 A.2d 147 (1981). However, it does not require that all persons under all circumstances enjoy identical protection under the law. *James v. SEPTA*, 505 Pa. 137, 477 A.2d 1302 (1984). The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, *Robson v. Penn Hills School District*, 63 Pa. Commw. 250, 437 A.2d 1273 (1981), and does not require equal treatment of people having different needs. *Houtz v. Commonwealth, Department of Public Welfare,* 42 Pa. Commw. 406, 401 A.2d 388 (1979). The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237 (1922), provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Commonwealth v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358 (1986). In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation." *quoted in Curtis v. Kline*, 542 Pa. 249, 255, 666 A.2d 265 (1995).

"It is by practical experience and not by theoretical inconsistencies that the question of equal protection is to be decided" and it is "no requirement of

equal protection that all evils of the same genus be eradicated." *Railway Express Agency v. New York*, 366 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949). The Supreme Court has concluded that "the problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L. Ed. 2d 491 (1970) (*quoting Metropolis Theatre Co. v. City of Chicago*, 288 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L. Ed. 730 (1913); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)).

The triggering of the Equal Protection Clause under mother's argument is this: married parents and cohabitating parents have the right to direct the care, custody and control of their children without state interference, but divorced or separated parents' rights are impaired because they are influenced by statute Section 5312, and this is a constitutional violation.

"To properly state an equal protection claim, plaintiff must allege that he is receiving different treatment from that received by other similarly situated individuals." *Chem v. Horn*, 725 A.2d 226, 1999 Pa. Commw. LEXIS 77 (1999). Here, the statutory scheme treats all non-intact families alike in Pennsylvania, so an argument can be made that there is no violation of Equal Protection under the statute, since all individuals within the class are treated alike, which would preclude making a claim under equal protection.

Even though, parents' constitutional rights to control the upbringing of their children are liberty interests derived from the Fourteenth Amendment, these rights are not unlimited. The *Meyer* case and its progeny establishing parental rights discussed *supra,* is well-developed, but the Court has not clearly explained the extent a state may interfere with these rights. *Troxel, supra*, 120 S. Ct. at 2066. The claim made here by mother is that Equal Protection is facially violated by the statutory scheme by classifying parents in two different ways.

The distinction mother makes is that intact families should be treated the same as non-intact, or divorced or separated families. This argument must fail, since there can be no intrusions into an intact family. When family integrity is intact, all government intrusions are constitutionally significant. In *Herron v. Seizak*, 321 Pa. Super. 466, 468 A.2d 803, 1983 Pa. Super. LEXIS 4446, the court held that grandparents lack standing where both parents are present and object to visitation. In intact families, imposed grandparent visitation by statute commonly fail, because the presumption is that childrearing decisions made by fit, married parents are in the best interests of the child. The *Herron* court, declined to permit visitation because "it is not within the purview of the court . . . to intervene in this family matter in which no legal rights are at issue." *Supra,* at 470. No legal rights were recognized or triggered by the court when the grandparents challenged visitation against an intact family. The fundamental right

of parents remains intact, as long as the family unit remains intact.

If we follow the argument further, that divorced, non-intact families should be treated the same and have the same rights as non-divorced parents, then the non-custodial, separated or divorced parent would have no rights, and no recourse under the law except to re-petition the court for joint custody.

If the parent with sole custody has the same autonomy vis-a-vis the state as an intact family, then when parents divorce, they must insist on joint custody. This is because the parent that is non-custodial will effectively have no rights to direct the care, custody and control of the child. Instead of attempting to amicably resolve a custody issue and relinquishing custody at the time of divorce to one parent, it will always turn into an ill-tempered battle, and it could heighten the animosity between the two separating spouses, and would drain the resources of the family courts' time all over the Commonwealth, taxing judicial efficiency. Grandparents insist that it is in nobody's best interest to create a constitutional mandate where parents who are divorced fight custody battles to the "bitter end."

If the government couldn't regulate the parental actions of a custodial parent in a non-intact family, then all custody orders would be unconstitutional, because they would presumptively violate equal protection. It is clear that there exists an adequate constitutional basis for distinguishing between

divorced and intact families. The state must oversee a divorce action, and arrange for custody, support and visitation in some cases. As the Pennsylvania Supreme Court has held, the state has a compelling interest in assuring the children in a broken union receive the care, attention and support that they would have received in the intact family.

The constitutionally protected right of family autonomy is not unfettered. There are many circumstances related to child health and well being in which state intervention is constitutional. *See Ginsberg v. New York*, 390 U.S. 629, 639, 88 S. Ct. 1274, 1280, 20 L. Ed. 2d 195 (1968).

Under our facts, one could argue that since the family integrity is disrupted, the family in the constitutionally protected sense no longer exists after a divorce. The fundamental right of liberty becomes a limited fundamental right when the competing interests of the non-custodial parent and certain statutorily defined individuals enter the sphere of the non-intact family. This concept is discussed at length by Anne C. Dailey in, *Constitutional Privacy and the Just Family*, 67 Tul. L. Rev. 955 (1993):

> The family unit thus clearly continues to play a central role within the broader doctrinal framework of constitutional liberty. But what exactly is this role? We might view the family as serving an instrumental function in defining the reach of individual privacy. In this view, the Constitution extends protection to family relationships because

> such protection "safeguards the ability independently to define one's identity that is central to any concept of liberty." The family, in other words, provides a useful boundary to confine the otherwise potentially limitless scope of individual liberty. In *Bowers v. Hardwick*, for example, the Court held that the Constitution does not "reach so far" as to protect individual privacy independent of family relations. As Justice Blackmun lamented in dissent, the Court in Bowers definitively rejected the notion that the Constitution protects those interests, which generally "form so central a part of an individual's life," and instead defined the "boundary" lines of constitutional privacy "by their connection to protection of the family." Bowers elevated the interests of the traditional family unit over those of autonomous individual standing outside the family realm . . . The family can be an instrument of individual liberty only when the interests of the individual and the family unit are in harmony. Where families are divided . . . the family can no longer be seen as serving the individual's needs.

Id. at 980-981.

The competing rights of the families to control child-rearing decisions, to obtain love and comfort, and to develop private relationships are pitted against the right of the legislature utilizing the *Parens Patriae* power of the state to justify an intrusion into the constitutionally protected realm of the family to protect the

child's interests. "The parens patriae doctrine allows a state to protect its quasi-sovereign interests in the health, comfort, and welfare of its citizens." Jack Ratliff, *Parens Patriae: An Overview*, 74 Tul. L. Rev. 1847, 1847 (2000).

The Court has permitted a limitation in parental rights by allowing state involvement in the welfare of children since *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, the Court held that the family is not beyond state regulation. *Id.* at 166-167. While responsibility for "custody, care and nurture" resides first in parents of the child, the state has the authority in matters affecting a child's welfare and has a broad range of powers to limit parental freedom and authority in those areas.

An exercise of the government's legislative power will generally be considered legitimate if it relates to the health, safety, morals or welfare of its citizens. *See Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926) (holding that land use regulations satisfy substantive due process unless they have "no substantial relation to the public health, safety, morals or general welfare"). Promulgation of Section 5312 indicates that our legislature considers the relationship between grandparents and grandchildren compelling enough to warrant protection under the power of the state.

> The Supreme Court has stated however, that "[w]here certain 'fundamental rights' are involved, the Court has held that that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and

> that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Thus, where "fundamental rights" are involved, the parens patriae power may only be exercised if the need to intervene on behalf of the child is compelling.

Shandling, *supra,* notes 57, 58, 59 at 130.

In the Petition for Writ, mother makes the assertion that "the state must identify those children who will suffer a greater harm from the denial of grandparent visitation," and she advances the concept that a "list of qualities could be created to identify the children who are at risk." Wegelin Petition for Cert. at 9. The Pennsylvania Legislature has indeed classified the children that could be harmed by denial of grandparent visitation – by whether or not the parents are divorced or separated, the distinction made in the statute.

Mother's Petition then advances a concept that the classifications created by the statute are "over inclusive and under inclusive." *Id.* at 9. The suggestion that the legislature must foresee and spell out any contingency in a statute is ludicrous. The statute is narrowly tailored and includes a provision concerning the application of the proposed visitation to ensure that it would be in the best interest of the child, and the court would also consider the effect on the parent-child relationship prior to application.

The justifications set forth by the Pennsylvania Supreme Court in holding 23 Pa. C.S.A. Section 5312 is sufficiently narrowly tailored to survive constitutional scrutiny, and that as written by the legislature

does not violate the Equal Protection Clause of the Fourteenth Amendment. This Court should therefore deny the Petition as to Question Presented No. 1.

CONCLUSION

For the reasons set forth above, Jean Schmehl and David Schmehl, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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